

U.S. Department of Labor

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Issue Date: 17 June 2010

OALJ Case No.: 2010-TLC-00039

ETA Case No.: C-10125-24178

In the Matter of

BELLE CHASE FARM d/b/a KEN SLYZIUK RANCH,
Employer

Certifying Officer: William L. Carlson
Chicago Processing Center

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

DECISION AND ORDER

On June 4, 2010, Belle Chase Farm d/b/a Ken Slyziuk Ranch (“the Employer”) filed a request for review of the Certifying Officer’s determination in the above-captioned temporary agricultural labor certification matter. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1184(c)(1); 20 C.F.R. § 655.115(a) (2009). On June 10, 2010, the Office of Administrative Law Judges received the Administrative File from the Certifying Officer (“the CO”). In administrative review cases, the administrative law judge has five working days after receiving the file to “review the record for legal sufficiency” and issue a decision. § 655.115(a).

Statement of the Case

On May 5, 2010, the United States Department of Labor's Employment and Training Administration ("ETA") received an application from Belle Chase Farm d/b/a Ken Slyziuk Ranch ("the Employer") for temporary labor certification. AF 50-56.¹ In particular, the Employer requested certification for one "Farm Laborer—Equipment" between June 15, 2010, and December 15, 2010. AF 50. Included with the Employer's application was a request for a waiver of the 45-filing deadline. AF 48. The Employer's agent wrote: "This is a new employer and he did not realize the tight time frames we are now working through. . . . We were not in control of these circumstances and ask to be waived from the 45 day USDOL deadline." *Id.*

On May 13, 2010, the Employer received a Notice of Deficiency ("NOD"), notifying the Employer that its application had not been accepted for processing. AF 28. The NOD gave the Employer the option of modifying its application within five business days. *Id.* Pertinent to this appeal, the CO stated that the Employer filed its application less than 45 calendar days prior to the start date, in violation of 20 C.F.R. § 655.134. The CO then wrote: "Based upon the written statement provided by the employer . . . a [CO] has determined that your request for emergency filing is not justified and a waiver of the required time period for filing will not be granted." AF 30.

On May 27, 2010, the CO denied the Employer's application. AF 19-24. Pursuant to 20 C.F.R. § 655.134, the CO asserted that the Employer, since it filed its application less than 45 days from the start date, needed to file a waiver of the required time period. AF 21. Accordingly, the CO wrote:

Upon receipt of the application, research was conducted and it was discovered that the employer . . . was not a first time filer with the Office of Foreign Labor Certification and had indeed previously submitted several H-2A Temporary Employment Applications. In 2004 and 2005, the employer filed under the name of Kenneth Slyziuk. In 2006, 2007, and 2008, the employer filed under the name of Ken Slyziuk/Bell Ranch. And in 2009, the employer filed under the name of Bell Ranch Cattle Co./Kenneth Slyziuk.

¹ Citations to the 67-page Administrative File will be abbreviated "AF" followed by the page number.

AF 21. As a result, the CO determined “that the request for emergency filing was not justified and waiver of the required time period for filing would not be granted.” AF 24. The CO denied the Employer’s application based on the 45-day filing requirement. The Employer’s appeal followed.

Discussion

An employer seeking labor certification must file an application not less than 45 days prior to the Employer’s date of need. 20 C.F.R. § 130(b). If the Employer fails to file at least 45 days prior to the start date,

the CO may waive the time period for filing for employers who did not make use of temporary alien agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause (which may include unforeseen changes in market conditions), provided that the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by §655.100.

20 C.F.R. § 655.134(a). Further, the regulations explain that good and substantial cause may include “the substantial loss of U.S. workers due to weather-related activities or other reasons, unforeseen events affecting the work activities to be performed, pandemic health issues, or similar conditions.” 20 C.F.R. § 655.134(b).

It is undisputed that the Employer filed its application less than 45 days prior to the start date. It is less clear whether the Employer used H-2A workers in the past. However, given the frequency of Ken Slyzuik’s name throughout the H-2A search, it is more likely than not that this Employer has used H-2A workers in the very near past. The Employer, in its request for review, indicates that Ken Slyzuik was “new to the 2010 regulations” but does not dispute that the Employer had used the program in the past. In any event, the Employer has worked in the agricultural field for some time and is experienced using the H-2A program in some form. Therefore, in order to obtain a waiver from the CO, the Employer had to show good and substantial cause for filing its application late. Moreover, it is important to note that the regulations give the discretion for approving waivers to the CO because he is in the unique position of being able to determine whether the shortened application period will allow him to test the domestic labor market in accordance with 20 C.F.R. § 655.100(b). As examples of

emergency situations, the regulations list occurrences such as pandemic health issues or market fluctuations. The time requirement is important in order to protect domestic workers, according to the regulations, and a waiver is granted in emergency situations only. After a careful review of the record, it appears that the Employer failed to meet the filing requirement because the Employer “did not realize the tight time frames.” Rather than an emergency situation, the record indicates that the Employer was simply not aware of the regulatory requirements, which is not cause for an emergency time waiver. Ultimately, the Employer bears the burden of proving that it is entitled to labor certification. *Cal Farms LLC and Washington Farm Labor Source LLC*, 2009-TLC-00049 (BALCA May 29, 2009). In the present case, the Employer failed to file within the required time period, and it failed to submit a sufficient explanation to the CO in order to obtain a waiver of the requirement. Since the Employer failed to establish good and substantial cause, certification was properly denied.

Order

In light of the foregoing, it is hereby **ORDERED** that the Certifying Officer’s decision is **AFFIRMED**.

For the Board:

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WILLIAM S. COLWELL
Associate Chief Administrative Law Judge